86-535

Supreme Court, U.S.
FILED
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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1986

BESSIELOVE LEE,

Petitioner,

v.

UNION ELECTRIC COMPANY a corporation, and UNION ELECTRIC RETIREMENT PLAN,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A key mandate of the Employees Retirement Insurance Security Act ("ERISA"), 29 U.S.C. Secs. 1001 et seq., and of the Department of Labor Regulations issued pursuant thereto, 29 C.F.R. Sec. 2520.102-2 et seq. is that employees shall be clearly informed as to how to avail themselves of their rights under retirement plans. The principal mechanism for providing this information is a "summary plan description." 29 U.S.C. Sec. 1022(a).

1. THE FIRST QUESTION for review is whether a summary plan description complies with these requirements if it does not state explicitly that an employee's failure affirmatively to elect an optional survivor benefit will

leave his or her surviving spouse unprotected if the employee dies before retirement.

2. THE SECOND QUESTION for review is whether, in order to obtain relief on the basis of a faulty summary plan description, a surviving widow/beneficiary must show that her deceased employee-husband had relied on or been prejudiced by the faulty summary, or whether, as in the case of proxy statements, causation should be presumed (Mills v. Electric Auto-lite Co., 396 U.S. 375) and, as in securities cases involving a failure to disclose, "positive proof of reliance" should not be required (Affiliated Ute Citizens v. U.S., 406 U.S. 128).

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(A) In holding the summary plan description adequate despite its failure to specify the need for an affirmative election, the decision below subverts a principal mandate of ERISA intended to guarantee to millions of employee-retirement-plan participants the same fullness of information assured to investors by federal securities laws;

(B) The decision below, in exacting an unrealistic standard for proof of reliance, conflicts

with holdings of this Court in securities cases and frustrates effectuation of ERISA's guarantee of full information.

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OPINIONS BELOW

After a trial without a jury, judgment was rendered in favor of Respondents by the District Court for the Eastern District of Missouri, Eastern Division, Hungate, J., 606 F. Supp. 317 (E.D. Mo. 1985).

The Court of Appeals for the Eighth Circuit affirmed in an opinion filed May 2, 1986, which on July 2, 1986 was modified by that Court of its own motion simultaneously with its denial of Petitioner's Petition for Rehearing. 789 F.2d 1303 (8th Cir. 1986).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals was filed on May 2, 1986.

Petitioner's Petition for Rehearing was denied by order of that court entered July 2, 1986.

This court has jurisdiction, by writ of certiorari, to review the Court of Appeals judgment by virtue of 28 U.S.C. Sec. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, which are set out verbatim in the Appendix, are:

29 U.S.C. Sec. 1022(a)(1) and (b) ("Plan description and summary plan description")

29 U.S.C. Sec. 1024(b)(1), (2) and (4) ("Publication of summary plan description to participants and beneficiaries of plan")

29 U.S.C. Sec. 1029(c) [Authority of the Secretary to issue regulations]

29 C.F.R. Sec. 2520.102-2(a)(1) and (b) ("Style and format of summary plan description")

29 C.F.R. Sec. 2520.102-3(j)(1), (k), and (L) ("Contents of summary plan description")

STATEMENT OF THE CASE

1. Jurisdiction of the District Court

Jurisdiction of the District Court was invoked under 29 U.S.C. Sec. 1132 (e)(1).

2. Survivorship benefits denied for want of election

This action for a survivor benefit or damages in lieu thereof was brought under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Secs. 1001 et seq., by the widow of a long- time employee and plan-participant of respondent Union Electric Company.

Petitioner's husband died at age 61 before having retired. Petitioner's claim for the survivor benefit was rejected by Respondents on the ground that, while she would have been eligible for the survivor benefit if her husband had lived to 65, her husband had not made the affirmative election which (as both courts below have held) was required under the Plan to entitle his widow to that benefit upon his death between ages 55 and 65 <u>while still working</u>.

Although additional grounds were asserted by Petitioner below (and decided adversely to her by the District Court or the Court of Appeals, or both) this Petition is grounded on Count III which alleges that, in breach of their duty under 29 U.S.C. Sec. 1022 (Sec. 102

of ERISA) Respondents failed to inform Petitioner's husband of the necessity for making that affirmative election.

Prior to enactment of ERISA, Respondents' Retirement Plan required an affirmative election by an employee if he wished, in exchange for a reduced monthly retirement payment, to have pension payments continue for his spouse, whatever his age at death. To conform to ERISA the Plan was amended to provide that, unless the employee had expressly opted out, after retirement at 65 his pension would continue for his surviving spouse at 50% of his monthly rate with a compensatory reduction in his payments so long as he lived.

As amended the Plan also provided (although this was not required by ERISA) that, if he retired between 55

and 65 his pension would likewise include a 50% benefit for his surviving spouse, unless he opted out. However, absent an affirmative election choosing the survivor benefit, one contingency was not covered: death between 55 and 65 while still employed (not retired), the fate which befell Petitioner's husband, who had not made this election.

3. Requirements of ERISA as to "Summary Plan Description"

So that plan participants will be informed of their rights and the pertinent terms and conditions, ERISA requires that they be furnished a "summary plan description" which has to be "sufficiently accurate and comprehensive to reasonably apprise such participants . . . of their rights and

obligations under the plan" and which has to contain, inter alia (29 U.S.C. Sec. 1022)(b):

> the plan's requirements concerning eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits.

In regulations issued pursuant to 29 U.S.C. Sec. 1029(c), the Department of Labor required that the summary must include (29 C.F.R. Sec. 2520.102-3):

> (k) . . . a statement describing any joint and survivor benefits provided under the plan, including any requirement that an election be made as a condition to select or reject the joint and survivor annuity.
>
> (L) . . . a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to

provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

4. Respondents' Summary Plan Description

The relevant portions of the September 1982 Summary Plan Description furnished by respondents to plan participants provide:

NORMAL METHOD OF PAYMENT IF YOU ARE MARRIED

If you are legally married at the time of your retirement, your normal method of payment of Retirement Income will be in the form of 50% Survivor Benefit Option under which your spouse is named as your survivor beneficiary. You will be paid a reduced Retirement Income and the amount of reduction will depend on the sex and age of your spouse. If your spouse survives you, your spouse will be paid 50% of the amount you were being paid, and for the remainder of his/her life.

If you do not want this normal method of payment, you will have the opportunity to elect not to be paid under the provisions of the 50% Survivor Benefit Option.

* * *

OPTIONAL FORMS OF RETIREMENT INCOME

The Plan provides optional forms of Retirement Income. These options may be elected by you, subject to the provisions of these options:

(a) 50% Survivor Spouse's Benefit Option for employees age 45 to 55 who are 100% vested.

* * *

(b) Survivor Benefit Option for employees age 55 to 65

This Survivor Benefit option enables you to provide 25%, 50%, 75% or 100% of your Retirement Income to be payable, after your death, to your spouse or any other person you name as your survivor beneficiary if you are willing to take a smaller Retirement Income when you retire. . .

[The Court of Appeals, without discussion, disregarded Petitioner's contention that adequacy of the summary

should be judged by the pre-1982 version, which did not mention a survivor benefit for employees age 55 to 65: Petitioner's husband died 9 months after issuance of the 1982 summary and a year's lead-time was required for an election to become effective. The prior, 1977, text, appears in the Appendix, pp. A78-A85].

5. Relevant Portions of Opinion of the Court of Appeals

The Court of Appeals wrote (in the original form of its opinion):

> . . .The summary plan booklet provided examples of the various payment forms in operation. In none of the examples, however, nor in the Plan terms, is it stated that an employee who dies before retirement without having elected the Survivor Benefit Option will not have provided survivor benefits for a spouse.
>
> * * *
>
> While the summary does not state explicitly that an employee's failure to choose an optional

> survivor benefit plan will leave his surviving spouse unprotected if the employee dies before retirement, we do not believe that section 1022(a) requires such a statement. The Plan [Petitioner's emphasis] states that employees must elect an alternative option to provide annuity payments to a surviving spouse in the event of the employee's death before retirement. It would be tautological to require the Plan [Petitioner's emphasis] also to state that if the Option is not elected, its benefits will not be available.

Later, "of its own motion" but after Petitioner had petitioned for rehearing on the ground that the Court had erroneously referred to the plan instead of the summary plan description, the Court inaccurately and artlessly amended the emphasized words to refer to the summary plan description instead of the plan: hence the amended opinion wrongly ascribes to the summary plan description

a reference to death before retirement which the summary does not contain.

The opinion of Court of Appeals goes on to say:

> The district court, having concluded that the summary plan description satisfied section 1022(a), further held that even if the summary description was not sufficiently clear, Mr. Lee was fully apprised of the relevant Plan provisions by the June 1974 letter and other pre-ERISA disclosures. The district court found that no evidence was introduced to show that Mr. Lee showed any interest in the Survivor Benefit Option...
>
> Our decision rests on our determination that the summary plan description adequately explained the need for an election. We think it is appropriate to note, however, that even had we found that the summary plan description was inadequate, the absence of any indication that Mr. Lee expressed any interest in the Survivor Benefit Option, despite the repeated opportunities to do so, would pose a significant barrier to recovery. To secure relief on the basis of a faulty summary plan description, the claimant

must show some significant reliance on, or possible prejudice flowing from the summary. . .

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE

(A) In holding the summary plan description adequate despite its failure to specify the need for an affirmative election, the division below subverts a principal mandate of ERISA intended to guarantee to millions of employee-retirement-plan participants the same fullness of information assured to investors by federal securities laws;

(B) The decision below, in exacting an unrealistic standard for proof of reliance, conflicts with holdings of this Court in securities cases and frustrates effectuation of ERISA's guarantee of full information.

The object of ERISA is protection of the pension and welfare rights of employees and their beneficiaries. An important facet of that protection is the requirement for furnishing full and

accurate information to participants and beneficiaries. This information requirement calls for a summary plan description which, as we have pointed out, must include a statement of circumstances which could lead to forfeiture and of the circumstances in which an election may be required. None of this was present in the Union Electric summary plan description and, indeed, Mr. Lee was positively misled into thinking that the normal method of annuity was by joint and survivor if he died, which he did.

ERISA was enacted in 1974. Some 40 years earlier Congress had enacted the Securities Act of 1933, 15 U.S.C. Secs. 77a et seq., and the Securities Exchange Act of 1934, 15 U.S.C. Secs. 77b et seq.

There is a striking analogy between those two Acts and ERISA. The New Deal securities legislation was designed to protect securities investors by requiring full and truthful disclosure. That purpose is directly comparable to the aim of ERISA's information requirements to protect retirement plan participants and beneficiaries. Just as investors in securities, persons participating in pension plans number in the millions. For the vast majority of pension participants, the plan represents a primary and often sole income source for retirement and for support of a surviving spouse. Furthermore, it is likely that most pension plan participants are less sophisticated than securities investors. Yet the decision below holds that

notwithstanding express statutory and regulatory mandates, a summary plan description did not have to spell out the pre-conditions for this widow's survivor benefit.

On the question of standard of proof of reliance, we ask the Court to consider two cogent and highly pertinent decisions:

> Mills v. Electric Auto-lite Co., 396 US 375, 24 L.ed. 2d 593, 90 S. Ct. 616 (1970)
>
> Affiliated Ute Citizens v. U.S., 406 US 128, 31 L.ed. 2d 741, 92 S. Ct. 1456 (1972)

In Mills, certain shareholders, sued to set aside enjoin a merger vote on the ground of material omissions from the proxy statement. In sustaining the shareholders, the Court held:

> Where a misstatement or omission in a proxy statement has been shown to be "material", as it was found to be here, that

determination itself indubitably embodies a conclusion that the defect was of such a character that it might have to be considered important by a reasonable shareholder who was in the process of deciding how to vote . . .

There is no need to supplement this requirement [that the defect have a significant propensity to affect the voting process] as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected,and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that shareholders are able to make an informed choice. . .

--396 U.S. at 384-5

In Affiliated Ute, the plaintiffs had sold securities to the defendants, who had, inter alia, named the price without disclosing that the going price was considerably higher. Suit was brought under well-known Rule 10b-5, 17 C.F.R. Sec. 240.10b-5, issued under Section 10 of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78j. The Court held:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in making this decision . . . This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.
>
> -- 406 U.S. at 153-54

Mills and Affiliated Ute are especially apposite here because, whereas the securities plaintiff is usually alive, in cases involving survivor benefits the employee is dead and cannot testify as to reliance and causation. While Petitioner believes that the circumstantial evidence (including the testimony of Respondent's own employees) adequately proves Mr. Lee's belief that he had a joint and survivor annuity, the practical difficulties of proving directly that a deceased employee was misled into believing that his or her spouse would receive an annuity after the employee's death are enormous. Hardly anyone can meet that burden and ERISA and its regulations would be meaningless if there is no recovery for losses caused

by employer's faulty summary plan descriptions.

CONCLUSION

Certiorari should be granted because this case presents important federal issues affecting millions of participants in and beneficiaries of employee retirement plans.(*)

Respectfully submitted,

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(*) Respondents may contend that the 1984 amendment, Pub.L. 98-397, Title I, Sec. 103(a), to 29 U.S.C. Sec. 1055 ("Requirements of joint and survivor annuity and preretirement survivor annuity") diminishes the importance of the questions presented for review. As

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amended in 1984, this section of ERISA requires that every retirement annuity be in the form of a 50% survivorship annuity unless the participant elects otherwise with the written and witnessed consent of the spouse beneficiary. However, the importance of assuring complete information and of the problem of proving reliance obviously go beyond the particular facts of the present case; moreover, even under amended annuity provisions it remains necessary to acquaint participants and beneficiaries with the relevant terms and conditions of the annuity.

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UNION ELECTRIC COMPANY
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ELECTRIC RETIREMENT PLAN,

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States Court of Appeals for the
Eighth Circuit

APPENDIX to

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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A. Opinion of the Court of Appeals for the Eighth Circuit (dated May 2, 1986) as amended by its Order dated July 2, 1986 amending the opinion and denying Appellant's Petition Rehearing; and Copy of that Order

NOTE: By its order of July 2, 1986 the Court of Appeals substituted new pages "9" and "10" for the like-numbered pages of its opinion of May 2, 1986. The only changes made were that in one place on each page the court amended the word "Plan" to read "Summary" and in one place on page 10 the Court amended "the Plan" to read "it". Instead of reproducing the entire amended pages 9 and 10, we have indicated the deleted words by running dashes through them, [e.g., ~~Plan~~] and the newly added words by solid capital letters [e.g., SUMMARY].

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 85-15-02

Bessielove Lee,	*	
	*	
Appellant,	*	Appeal from
	*	the United
v.	*	States Dis-
	*	trict Court
Union Electric Company,	*	for the
a Corporation, and Union	*	Eastern Dis-
Electric Retirement Plan,	*	trict of
	*	Missouri.
Appellees.	*	

Submitted: November 15, 1985

Filed: May 2, 1986

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Bessielove Lee, the widow of former Union Electric Company (the Company), employee Guy Lee, Jr. appeals from a district court judgment denying her claim under the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1381 (1982 & Supp. III 1984), for survivor annuity benefits from the Union Electric Retirement Plan (the Plan). Mrs. Lee claimed a right to

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1. The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

survivor annuity benefits under the Plan or, in the alternative, damages equal to such benefits to compensate for the Company's failure to adequately inform Mr. Lee in the summary plan description of the need for such an election. The district court held that the terms of the Plan in effect at Mr. Lee's death in 1983 required him to affirmatively elect survivor benefits in order to provide annuity payments to his wife in the event of his death before retirement. Since Mr. Lee died before retirement without making this election, the court held, Mrs. Lee had no right to annuity payments.2 The court also held that the Company provided Mr. Lee adequate

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2. Mrs. Lee was entitled to, and did receive, a lump sum payment of Mr. Lee's premium contributions to the Plan.

information on the need for an election in the summary plan description and pre-ERISA information packet and therefore was not liable for damages. Lee v. Union Electric, 606 F. Supp. 317 (E.D. Mo. 1985). On appeal, Mrs. Lee essentially reasserts her claims made before the district court. We affirm the court's judgment.

In this appeal we conclude (1) that the Plan in effect at Mr. Lee's death by its terms required him to affirmatively elect the Survivor Benefit Option, set forth in section 8.03 of the Plan, in order that his widow would receive survivor's annuity benefits on his death before retirement; and (2) that the summary plan description adequately explained the need for an election and therefore was not deficient under ERISA.

The 1974 Union Electric Retirement Plan provided that the regular method of retirement benefit payment, applicable automatically unless the employee otherwise elected, was a life annuity commencing on the employee's retirement date.3 In the alternative, the employee could elect the Contingent Annuity Option under which the employee agreed to receive a reduced retirement income during his or her life, and designated an annuitant to receive, upon the employee's death, a life annuity amounting to 100, 75, 50 or 25 percent of the employee's pension benefits. The

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3. The Plan allowed early retirees to elect to have payments commence on the first day of any month after early retirement prior to the regular retirement date. Union Electric Retirement Plan, § 8.02 (effective May 1, 1981). Joint Appendix (J.A.) at 213.

Contingent Annuity Option could not become effective before the latter of the employee's fifty-fifth birthday or two years after the date of the election. Union Electric Retirement Plan, § 7.02 (effective Apr. 1, 1974). J.A. at 67.

On June 28, 1974, shortly before his fifty-third birthday, Mr. Lee received an information packet from the Company notifying him of his eligibility to elect the Contingent Annuity Option. The information packet contained a statement of Mr. Lee's Plan benefits; an explanatory booklet on the Contingent Annuity Option, which included examples of how the Option operated; a Notice of Election Form; a sample completed Noticed of Election Form; and a form on which the employee could request further

information or notify Union Electric of his or her interest in the Contingent Annuity Option.

A letter accompanying the packet explained that the Contingent Annuity Option permits employees to provide for a portion of their retirement income to be paid, after the employee's death, to the employee's chosen annuitant. Under this option, the employee would receive a smaller pension when he or she retired. The letter explained:

> (b) You may elect the Option to be in effect as early as your 55th birthday and before you retire. If the Option is in effect and you die before you retire, and if your Contingent Annuitant survives you, she (he) would be paid a monthly pension for the remainder of her (his) life. Such monthly pension would be a percentage, as specified in your elected Option, of the pension that would have been paid to you if you had lived and retired on the first of the month following your death; * * *.

Letter from E. W. Nolle to Guy Lee, Jr. (June 28, 1974) (discussing Contingent Annuity Option). J.A. at 111. The letter also provided:

> The decision to elect the Option or not is a matter of personal judgment to be based on your particular circumstances and objectives. The election and operation of the Option is a complex matter and you may want more information before you decide to elect it or not. If so, we will be glad to review it with you at your convenience.

Id.

The explanatory booklet further described the Contingent Annuity Option. The booklet stated that the Option had to be in effect in order for a contingent annuitant to receive monthly payments upon the employee's death prior to retirement. Under the heading "What If I Die Before I Retire" the booklet stated:

> If the Option is in effect and you die before you retire, a monthly payment, starting as of the first of the month after your death, would be made to your "Contingent Annuitant" if she (he) is still living. The monthly payment would continue for the life of your "Contingent Annuitant" and would amount to the percentage, as elected by you, of the pension that would have been paid to you if you had lived and retired on the first of the month following your death. (See Example III attached.)

Union Electric Retirement Plan Explanatory Booklet, Contingent Annuity Option (Emphasis in original). J.A. at 119. The examples provided in the booklet included illustrations in which the employee died before retirement. Id. J.A. at 125.

The district court found that Mr. Lee did not respond to this mailing. The Company sent a follow up letter with the same information. Again that letter stressed the importance of the election

and invited Mr. Lee to seek further information from the Company. The letter contained a self-addressed envelope and urged Mr. Lee to use it to indicate his election or his interest in the Option. Again, the district court found, Mr. Lee did not respond.

The Company notified its employees by mail in October 1975 of proposed changes in the Plan to bring it into conformity with ERISA. A copy of this letter was found among Mr. Lee's personal effects after his death. The letter summarized the proposed changes in the Plan. The following segment is relevant:

> The payment of retirement income provisions will be amended to provide that the <u>normal</u> form of annuity payment will be a qualified spouse benefit with the 50% Contingent Annuity Option in effect at retirement, provided the employee is married prior to the initial date of commencement

> of benefit payments. All other provisions now contained in the Plan which define the terms and conditions of the Contingent Annuity Option will be continued. It will be amended, however, to provide that a participant may elect, upon proper notice to the Company, to receive his benefits under the life annuity option of the Plan without a spouse benefit.

Letter from P.J. Potts to Executive, Supervisory, Administrative, Professional, Confidential, and other Non-Union Employees (Oct. 29, 1975) (emphasis in original). J.A. at 137, 139.

The changes became effective January 1, 1976 and the Company distributed an amended Plan booklet. Article VIII of the amended Plan stated the retirement income options. Section 8.01 stated that the normal method of retirement income payment to a retired employee with a qualified spouse would be a 50%

Contingent Annuity Option with the employee's spouse named as the contingent annuitant. The normal method of payment for an employee without a qualified spouse remained a life annuity. Employees could elect not to be paid under the normal payment plan.

Section 8.02 of the Plan established the regular payment terms. It specifically distinguished between payment terms on death after retirement, and on death before retirement:

> Regular Payments. The first payment of an employee's retirement income will be made on his retirement date * * * . Subsequent payments will be made monthly thereafter, ceasing with the last payment preceding death of the employee; provided, however, if the deceased retired employee retired under the normal form of payment of a 50% Contingent Annuity Option or had elected the Contingent Annuity Option in accordance with Section 8.03 and it was in effect, monthly payments will be made to the Contingent Annuitant

> starting the month following the death of the retired employee and will continue until the death of the Contingent Annuitant. Upon the death of an employee prior to retirement, and if the deceased employee had elected the Contingent Annuity Option and it was in effect, monthly payments will be made to the Contingent Annuitant starting the month following the death of the employee, and will continue until the death of the Contingent Annuitant.

Union Electric Retirement Plan § 8.02, at 17 (effective Jan. 1, 1976) (emphasis added). J.A. at 142. The change to a survivor annuity plan as the normal method of retirement benefit payment brought the Plan into conformity with 29 U.S.C. § 1055(a) (1982). The last sentence of section 8.02, dealing with payments on death before retirement, makes clear the need for an affirmative election to provide annuity benefits to

the spouse of an employee who dies before retirement.

Section 8.03 of the Plan explained the contingent Annuity Option, which the employees could elect to become effective as early as the employee's fifty-fifth birthday or two years after the election is made. The essential characteristics of this Option, as stated in the preceding announcement letter, remained unchanged by the 1976 amendment: the employee was required to affirmatively elect the Option; the employee could elect to provide 25, 50, 75 or 100 percent of his pension to the annuitant; and an effective election would cause the employee to receive lower pension benefit payments after retiring.

The Plan again was amended in 1979 and 1980, in ways not relevant to the issues which we address here. Finally, in a May 1981 amendment the names of the retirement payment methods were changed. The 50% Contingent Annuity Option was renamed the 50% Survivor Benefit Option. The Contingent Annuity Option was renamed the Survivor Benefit Option.

To satisfy ERISA requirements, 29 U.S.C. § 1021, the Company distributed a summary plan description to covered employees which summarized, among other things, the payment terms of the Plan effective at Mr. Lee's death. Under the heading "Optional Forms of Retirement Income", the summary listed a 50% Survivor Spouse's Benefit Option for employees aged forty-five to fifty-five years, and a Survivor Benefit Option for

employees aged fifty-five to sixty-five years. The summary explained that both options must be elected, and that the employee's own retirement income would be reduced commensurate with the annuity level elected. The summary plan booklet provided examples of the various payment forms in operation. In none of the examples, however, nor in the Plan terms, is it stated that an employee who dies before retirement without having elected the Survivor Benefit Option will not have provided survivor benefits for a spouse.

Mrs. Lee first challenges the district court's holding that the Plan's normal payment method applies only to retirement benefits for employees who live to retirement. She maintains that the post-ERISA changes in the Plan

dispensed with the election requirement, and that the normal retirement income payment method automatically provided survivor's benefits to the spouse of employees who died before retirement.

The Plan specifically states that normal payments commence upon the employee's retirement, with survivor's benefits to the spouse of the deceased retired employee. In the summary plan description it is also stressed that this normal payment method is available "if you are legally married at the time of your retirement." Summary Plan Description at 14. J.A. at 176. We conclude that the spouse of an employee who dies before retirement does not have a claim to a retirement annuity under the normal payment method. There was no forfeiture of benefits to which Mrs. Lee

is entitled because the Plan does not provide survivor annuity benefits to the spouse of a deceased active employee without an affirmative election of such benefits. Mr. Lee failed to make such an election. The district court, therefore, correctly held that Mrs. Lee was not entitled to annuity payments under the terms of the Plan.

We turn now to Mrs. Lee's alternative argument that the summary plan description did not adequately explain that an employee must affirmatively elect to provide survivor annuity payments to his or her spouse in the event of the employee's death before retirement. Mrs. Lee does not contend that her husband thought he had elected the Survivor Benefit Option when he had not. Rather, she contends that he

believed the normal payment method, the 50% Survivor Benefit Option, would provide annuity payments to his spouse if he died before retirement.

ERISA required plan administrators to provide plan participants and beneficiaries a summary plan description "written in a manner calculated to be understood by the average Plan participant and * * * sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1982). Regulations promulgated by the Department of Labor emphasize clear presentation of plan information so that participants are not misled, misinformed, or uninformed of plan terms. 29 C.F.R. § 2520.102-2

(1985). The regulations also state that plan administrators, in drafting the summary plan description, "shall exercise continued judgment and discretion by taking into account such factors as the level of education and comprehension of the typical plan participant." Id. Finally, the regulations advocate use of simple sentences, clarifying examples and illustrations, and limitation of technical jargon in the summary plan description. Id.

At the outset we note that Union Electric could go a long way towards simplifying the Plan by using more distinctive labels for the options. Nonetheless, we cannot conclude that the summary plan description was deficient in explaining the need to elect the

options and therefore violated ERISA's disclosure requirements.

The summary plan description states the normal and optional methods of retirement income payment in simple non-technical language. Under the heading "Normal Method of Payment if You Are Married" the summary plan description states:

> If you are legally married at the time of your retirement, your normal method of payment of Retirement Income will be in the form of 50% Survivor Benefit Option under which your spouse is named as your survivor beneficiary. You will be paid a reduced Retirement Income and the amount of reduction will depend on the sex and age of your spouse. If your spouse survives you, your spouse will be paid 50% of the amount you were being paid, and for the remainder of his/her life.
>
> If you do not want this normal method of payment, you will have the opportunity to elect not to be paid under the provisions of the 50% Survivor Benefit Option.

Summary Plan Description, J.A. at 268 (emphasis added). Under the heading "Optional Forms of Retirement Income" the ~~Plan~~ SUMMARY states:

> The Plan provides optional forms of Retirement Income. These options may be elected by you, subject to the provisions of these options.
>
> * * *
>
> (b) Survivor Benefit Option for employees age 55 to 65
>
> This Survivor Benefit option enables you to provide 25%, 50%, 75% or 100% of your Retirement Income to be payable, after your death, to your spouse or any other person you name as your survivor beneficiary if you are willing to take a smaller Retirement Income when you retire. * * * You may not elect this option for a person other than your spouse if by such election your Retirement Income would be reduced to less than 51% of normal value at age 65.

Summary Plan Description (emphasis added), J.A. at 271. The information

provided was supplemented by examples of the operation of the various options.

While the summary does not state explicitly that an employee's failure to choose an optional survivor benefit plan will leave his or her surviving spouse unprotected if the employee dies before retirement, we do not believe that section 1022(a) requires such a statement. The ~~Plan~~ SUMMARY states that employees must elect an alternative option to provide annuity payments to a surviving spouse in the event of the employee's death before retirement. It would be tautological to require ~~the Plan~~ IT also to state that if the Option is not elected, its benefits will not be available.

The district court, having concluded that the summary plan description

satisfied section 1022(a), further held that even if the summary description was not sufficiently clear, Mr. Lee was fully apprised of the relevant Plan provisions by the June 1974 letter and other pre-ERISA disclosures. The district court found that no evidence was introduced to show that Mr. Lee showed any interest in the Survivor Benefit Option. The court noted that although there was testimony that Mr. Lee had stated that Mrs. Lee would receive a percentage of his retirement benefits, on cross-examination, the witness stated that Mr. Lee had emphasized that Mrs. Lee would receive such benefits if and when he retired.

Our decision rests on our determination that the summary plan description adequately explained the

need for an election. We think it is appropriate to note, however, that even had we found that the summary plan description was inadequate, the absence of any indication that Mr. Lee expressed any interest in the Survivor Benefit Option, despite the repeated opportunities to do so, would pose a significant barrier to recovery. To secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary. See Govoni v. Bricklayers, 732 F.2d 250, 252 (1st Cir. 1984); Hillis v. Waukesha Title Co., Inc., 576 F. Supp. 1103, 1109-10 (E.D. Wis. 1983).

We hold that Mrs. Lee has no claim to survivor annuity payments because her

husband did not elect the Survivor Benefit Option. The Plan required such an election and the summary plan description adequately explained the need for this election. We therefore affirm the district court's judgment.

* * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1502-EM

Bessielove Lee,	*	
	*	
Appellant,	*	Appeal from
	*	the United
v.	*	States Dis-
	*	trict Court
Union Electric Company	*	for the
Union Electric Retirement	*	Eastern Dis-
Plan,	*	trict of
	*	Missouri.
Appellees.	*	

Appellant's petition for rehearing has been considered by the Court and is hereby denied.

The court, on its own motion, substitutes the attached pages 9 and 10 in the original opinion.

July 2, 1986

B. Judgment and Memorandum, with Findings of Fact and Conclusions of Law, of the District Court for the Eastern District of Missouri, Eastern Division, Hungate, J., dated March 24, 1986.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BESSIELOVE LEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 83-2547C(3)
	)	
UNION ELECTRIC COMPANY, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

Findings of fact and conclusions of law dated this day are hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be and the same is entered in defendants' favor and against plaintiff, with each side to bear its own costs.

Dated this 26th day of March, 1985.

/s/ William L Hungate,

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BESSIELOVE LEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 83-2547C(3)
	)	
UNION ELECTRIC COMPANY, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM

Plaintiff, the widow of a former Union Electric Company employee, brings this action under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq., to recover survivor benefits allegedly owed to her by virtue of Union Electric Company's retirement plan. Plaintiff alleges that defendants violated their duty under ERISA accurately to inform participants of their rights and

obligations under the plan, thereby causing plaintiff's husband to fail to make an election for survivor benefits for plaintiff.

A nonjury trial was held on January 3, 1985.

Findings of Fact

1. Plaintiff, Bessielove Lee, is an individual who resides in the Eastern District of Missouri and is the surviving spouse of Guy Lee, who died on July 19, 1983, at age 61.

2. Defendant, Union Electric Company (the Company), is a Missouri corporation and was at all times the sponsor and administrator of defendant Union Electric Retirement Plan (Plan).

3. Except for those periods of time during which he served in the armed forces, Guy Lee was employed by the

Company from 1940 through his death in 1983. Mr. Lee was a participant in the Plan at issue.

4. Prior to the enactment of ERISA, the Company's Plan provided for the payment of retirement income, to qualified retirees, in the form of a life annuity with monthly payments until time of death. However, if an employee affirmatively elected a "Contingent Annuity Option," available under the Plan, and the option was in effect at the employee's death, monthly payments would be made to the employee's contingent annuitant following the death of the employee after age 55. These payments were to be made regardless of whether or not the employee had retired by the time of his death. (Plaintiff's Ex. 19.)

5. The Contingent Annuity Option was explained in Section 7.02 of the Plan, and provided that:

> a. An employee may . . . elect to receive a reduced retirement income during his life and designate a Contingent Annuitant, if living, to receive, following the employee's death on or after the effective date of the Option, the same amount or such smaller amount as the employee may designate. Such Option may be elected while in the service of the Company at any time prior to normal (or early) retirement date, to become effective on a date specified by the employee, but may not become effective until the later of (1) the employee's 55th birthday, or, (2) two years after the date of election. If either the employee or the designated Contingent Annuitant is not living on the specified effective date, the Option shall not become effective. The reduced monthly retirement income the retired employee is to receive and the monthly amount the Contingent Annuitant is to receive shall be determined from the attached Schedule H, entitled, "Factors for Determination of Monthly Retirement Income Under Contingent Annuity Option."

6. A few months before his fifty-third birthday, Mr. Lee received a packet of information from the Company in regard to the Contingent Annuity Option. In addition to the letter explaining the Option, the Company sent to Mr. Lee a statement of his Plan benefits, an explanatory booklet on the Option, an election form and sample completed election form, and a form for notification of interest in further information or of no interest in the Option. (Defendants' Ex. H.)

7. The letter, which was found among Mr. Lee's papers after his death, informed Mr. Lee of the Option's two-year waiting period before becoming effective and of other important Option provisions, and also stated that:

> The decision to elect the Option or not is a matter of personal judgment to be based on your

particular circumstances and objectives. The election and operation of the Option is a complex matter and you may want more information before you decide to elect it or not. If so, we will be glad to review it with you at your convenience.

8. The explanatory booklet sent with the letter thoroughly defined and explained the Option and provided specific examples of its operation and effect. The booklet clearly stated that the Option must be in effect for a Contingent Annuitant to receive monthly payments upon an employee's death prior to retirement:

> 6. WHAT IF I DIE BEFORE I RETIRE?
>
> If the option is in effect and you die befcre you retire, a monthly payment, starting as of the first of the month after your death, would be made to your "Contingent Annuitant" if she (he) is still living. The monthly payment would continue for the life of your "Contingent Annuitant" and would amount to the percentage, as elected by

> you, of the pension that would have been paid to you if you had lived and retired on the first of the month following your death. (See Example III attached.)

(emphasis in original).

9. When the Company did not receive any response from Mr. Lee, another letter was sent to him on August 15, 1974, reminding him of the Option and requesting that he inform the Company whether he wished to elect the Option or had any future interest in it. A self-addressed envelope was enclosed with the letter, which again advised Mr. Lee of the Company's willingness to provide further information:

> The decision to elect the Option or not is a matter of your personal judgment and should be based on your particular circumstances and objectives. The election and operation of the Option is a complex matter and you may want more information before you decide to elect it or not.

> If you want more information or have misplaced our earlier letter which was accompanied by an explanatory booklet and a statement of your benefits under the Retirement Plan, you are invited and encouraged to call us (stations 2670 or 2774) or write to us (mail code 533).

10. The Company never received either a notice of election or a notice of decision not to elect, nor did the Company ever receive any proof of age for a Contingent Annuitant for Mr. Lee, as required by the notice of election.

11. On October 29, 1975, the Company sent a memorandum summarizing Plan changes called for by ERISA. (Defendant's Ex. K.) The memorandum stated that:

> 4. The payment of retirement income provisions will be amended to provide that the <u>normal</u> form of annuity payment will be a qualified-spouse benefit with the 50% Contingent Annuity Option in effect at retirement, provided the employee is married prior to

> the initial date of commencement of benefit payments. All other provisions now contained in the Plan which define the terms and conditions of the Contingent Annuity Option will be continued. It will be amended, however, to provide that a participant may elect, upon proper notice to the Company, to receive his benefits under the life annuity option of the Plan without a spouse benefit.

(emphasis in original).

12. The Company's amended Plan, effective as of January 1, 1976, provided that the normal method of payment of retirement income for an employee with a qualified spouse would be in the form of a "50% Contingent Annuity Option." This method entailed monthly payments to the participant following retirement, with monthly payments to the Contingent Annuitant, if living, following the participant's death. (Plaintiff's Ex. 21.)

13. The Plan also provided for election of a "Contingent Annuity Option," which could be elected to become effective as early as an employee's fifty-fifth birthday two years after the election, under which a Contingent Annuitant could be designated to receive monthly payments following an employee's death after the effective date of the Option. The participant need not have retired for the Option to go into effect. (Plaintiff's Ex. 21.)

14. Section 8.02 of the Plan explained that:

> [I]f the deceased <u>retired</u> employee retired under the normal form of payment of a 50% Contingent Annuity Option or had elected the Contingent Annuity Option in accordance with Section 8.03 and it was in effect, monthly payments will be made to the Contingent Annuitant starting the month following the death of the <u>retired</u> employee and will continue until the death of the Contingent Annuitant. Upon the

> death of an employee prior to retirement, and if the deceased employee had elected the Contingent Annuity Option and it was in effect, monthly payments will be made to the Contingent Annuitant starting the month following the death of the employee, and will continue until the death of the Contingent Annuitant.

(emphasis added).

15. On May 25, 1976, the Company issued a memorandum regarding the passage of ERISA. The letter stated that information on various plans was available to employees at a reasonable charge, and that all plan documents were available for examination at no charge. The letter concluded with:

> If you have any questions about this Notice or your rights, contact the Employee Benefits Department. You may call (Station 2546) or visit Room W117 at the General Office Building. Also, the nearest Area Office of the Labor Department has people who will be able to assist you or provide you with additional information.

(Plaintiff's Ex. 27.)

16. A description of the Plan was issued to employees by the Company in November of 1977. (Plaintiff's Ex. 22.) The summary identified the normal method of payment of retirement income as the "50% Contingent Annuity Option." The summary identified as an optional form of retirement income the "Contingent Annuity Option," which "enables you to provide 25%, 50%, 75% or 100% of your Retirement Income to be payable, after your death, to the person you name as your contingent annuitant. . ."

17. The summary stated that the Option could become effective as early as the employee's fifty-fifth birthday, but no specific examples were provided to illustrate the Option's effect upon payments after an employee's death prior

to retirement. The summary did not explicitly state that if an employee died prior to retirement without having elected the "Contingent Annuity Option," no monthly payments would be made to a surviving spouse.

18. The Plan was amended again in 1979 and 1980 and then in May of 1981. In May of 1981, the "50% Contingent Annuity Option" became known as the "50% Survivor Benefit Option," and the "Contingent Annuity Option" became known as the "Survivor Benefit Option." Additionally, the Plan provided for a "Survivor Spouse's Benefit Option" whereby, upon election, an employee could provide for payment of fifty percent of his retirement income to his spouse if he died after his forty-fifth

birthday with the Option in effect. (Plaintiff's Ex. 24.)

19. At all times between 1971 and Mr. Lee's death in 1983, the Plan required an affirmative election to provide for monthly payments of an employee's retirement income to his spouse following his pre-retirement death. Such an election entailed acceptance of a smaller retirement income for the employee if he lived to retirement.

20. No evidence was introduced to suggest that Mr. Lee ever indicated any interest in a Contingent Annuity/ Survivor Benefit Option or ever asked for assistance in planning for his spouse's future. Mr. Lee's son, Guy J. Lee III, said that Lee had told him plaintiff would be provided for from his

retirement fund. Mr. Lee's son, Gary, testified that he overheard Mr. Lee state that plaintiff would get a percentage of his retirement money; however, on cross-examination, he acknowledged that Mr. Lee said she would receive it when and if he retired.

Conclusions of Law

1. ERISA requires that summary plan descriptions be provided to each participant in an employee benefit plan, 29 U.S.C. § 1021(a), and that the description "be written in a manner calculated to be understood by the average plan participant and. . . be sufficiently accurate and comprenensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C.

§ 1022(a)(1). See also 29 C.F.R. § 2520.102-2.

2. Plaintiff argues that the use of the terms "50% Contingent Annuity Option" and "Contingent Annuity Option" was confusing. Since employees were told that the normal method of payment of retirement income for employees with qualified spouses was by the former option unless they affirmatively elected otherwise, plaintiff argues, Mr. Lee naturally assumed that this option also insured coverage for his wife upon his death prior to retirement. However, all Company references to death before retirement stated that payments to a surviving spouse would be made if the Contingent Annuity Option had been elected and was in effect.

3. Even assuming that the Company's post-ERISA summaries and information were not sufficiently clear, the Court finds that Mr. Lee was apprised of the relevant Plan provisions by the pre-ERISA letter of explanation sent to him in June of 1974. The letter and accompanying explanatory materials informed Mr. Lee of the necessity of electing the Contingent Annuity Option if he was to provide for his wife after his death, either before or after retirement, and Mr. Lee indicated no interest in doing so. While the Plan later provided for a contingent annuity to be paid to an employee's spouse upon the employee's post-retirement death, the requirement of affirmatively electing a contingent annuity to cover a spouse upon pre-retirement death never

changed. The materials sent to Mr. Lee in June of 1974 provided numerous examples of various contingencies and how the Plan affected them. Moreover, when Mr. Lee failed to respond to this information, the Company sent an additional informative letter seeking his decision.

4. Finally, the Court finds it significant that Mr. Lee never made any effort to contact any knowledgeable person in the Company for further information or explanation, despite repeated invitations from the Company to do so. The Plan administrator satisfied the fiduciary obligation owed to Mr. Lee under ERISA; fiduciaries are not expected to provide individualized attention to participants. See Allen v. Atlantic Richfield Retirement Plan,

480 F.Supp. 848, 851 (E.D. Pa. 1979), aff'd, 633 F.2d 209 (3rd Cir. 1980).

5. In Hopkins v. FMC Corp., 535 F.Supp. 235 (W.D.N.C. 1982), plaintiff charged violation of fiduciary duty following the cancellation of her husband's elected 100% Joint and Survivor Annuity upon her husband's pre-retirement death. The deceased had been on long-term disability leave of absence for an extended period prior to his death; had he chosen instead to accept early retirement, the annuity would have been in effect at his death. However, the deceased would have received less money each month as a retiree than he did while employed but on leave.

As in this case, there was no evidence that the deceased had ever

notified his company of any concern or confusion about his benefits, and he had received a comprehensive summary of the plan. The Hopkins court found the absence of employee-initiated inquiry into the relevant provision significant in light of the deceased's ability to inquire if he chose.

This Court finds the Hopkins analysis applicable to the facts of this case. Accordingly, defendants are entitled to judgment.

Dated this 26th day of March, 1985.

/s/ William L. Hungate,
UNITED STATES DISTRICT JUDGE

C. Relevant Statutes and Regulations

Title 29, United States Code
§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under

subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification,

ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

(Pub.L. 93-406, Title I, ™102, Sept.2, 1974, 88 Stat. 841.)

™ 1024. Filing and furnishing of information

* * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan

descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title --

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes

subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 after the

end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

* * *

(4) The administrator shall, upon

written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(Pub.L. 93-406, Title I, ™ 104, Sept. 2, 1974, 88 Stat. 847.)

™ 1029. Forms

* * *

(c) Format and content of summary plan description, annual report, etc.,

required to be furnished to plan participants and beneficiaries

The Secretary may prescribe the format and content of the summary plan description, the summary of the annual report described in section 1024(b)(3) of this title and any other report, statements or documents (other than the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated), which are required to be furnished or made available to plan participants and beneficiaries receiving benefits under the plan.

(Pub.L. 93-406, Title I, ™ 109, Sept. 2, 1974, 88 Stat. 850.)

29 C.F.R.
™ 2520.102-2

Style and format of summary plan description

(a) Method of presentation. The

summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations,

the use of clear cross references and a table of contents.

(b) General format. The format of the summary plan description must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries. Any description of exception, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either

exaggerating the benefits or minimizing the limitations. . .

¶ 2520.102-3 Contents of summary plan description.

Section 102 of the Act specifies information that must be included in the summary plan description. The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed. The following information shall be included in the summary plan description of both employee welfare benefit plans and employee pension benefit plans, except as stated otherwise in paragraph (j) through (n):

* * *

(j) The plan's requirements respecting eligibility for participation

and for benefits. The summary plan description shall describe the plan's provisions relating to eligibility to participate in the plan, such as age or years of service requirements, and the items listed in paragraphs (j)(1) or (2) of this section as appropriate:

> (1) For employee pension benefit plans, it shall also include a statement describing the plan's normal retirement age, as that term is defined in section 3(24) of the Act, and a statement describing any other conditions which must be met before a participant will be eligible to receive benefits. Such plan benefits shall be described or summarized. . .

(k) In the case of an employee pension benefit plan, a statement describing any joint and survivor benefits provided under the plan, including any requirement that an election be made as a condition to

select or reject the joint and survivor annuity;

(l) For both pension and welfare benefit plans, a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

D. Excerpt from Appellant's Petition for Rehearing

SUMMARY OF GROUNDS FOR REHEARING

The Court erred:

A. In holding that the summary plan description did not fall short of the requirements of 29 U.S.C. Sec. 1022(a) and the pertinent Department of Labor Regulation, 29 C.F.R. Sec. 2520.102-3, as a result of (1) a seeming mistake in expressly reading into the Summary Plan Description information presented only in the Plan, (2) finding without warrant that the Plan Description describes the need for an election, and (3) disregarding the directly applicable portions of the above-mentioned Regulation, namely paragraphs (k) and (L).

B. In holding that claimant "must show some significant reliance" [or

possible prejudice flowing from the summary plan description] -- and in that respect failing to follow the Supreme Court decisions in analogous securities cases cited by Appellants. Affiliated Ute Citizens v. U.S. , 406 US 128 at 153-4 (1972); Mills v. Electric Autolite Co., 396 US 375 at 384 (1970).

C. In construing the evidence as failing to show that Mr. Lee expressed any interest in the survivor benefit Option.

E. Excerpts from the 1982 and 1977 Summary Plan Descriptions.

1. Excerpt from 1982 Summary Plan Description

NORMAL METHOD OF PAYMENT
IF YOU ARE MARRIED

If you are legally married at the time of your retirement, your normal method of payment of Retirement Income will be in the form of 50% Survivor Benefit Option under which your spouse is named as your survivor beneficiary. You will be paid a reduced Retirement Income and the amount of reduction will depend on the sex and age of your spouse. If your spouse survives you, your spouse will be paid 50% of the amount you were being paid, and for the remainder of his/her life.

If you do not want this normal method of payment, you will have the opportunity to elect not to be paid

under the provisions of the 50% Survivor Benefit Option.

EXAMPLE

Assume the employee in the example shown in the section titled "RETIREMENT INCOME", is a male and is 65 years of age at January 1, 1983 and retires on that date. He is married and his wife is three full years younger than he.

The monthly Retirement Income calculations are as follows:

His Retirement Income accrued at January 1, 1983	$719.11
50% Survivor Benefit factor for male employee with wife 3 years younger is	x84.9%
His reduced Retirement Income payable for his life	$610.52
50% Survivor Benefit Option	x 50%
Wife's Retirement Income payable for her life is she survives husband	$305.26

If his wife does not survive him, he will continue to be paid his reduced pension in the amount of $610.52

NORMAL METHOD OF PAYMENT IF YOU ARE NOT MARRIED

If you are not legally married at the time of your retirement, your normal method of payment of Retirement Income will be in the form of a life annuity payable for the remainder of your life unless you have elected one of the optional forms of payment.

OPTIONAL FORMS OF RETIREMENT INCOME

The Plan provides optional forms of Retirement Income. These options may be elected by you, subject to the provisions of these options.

(a) 50% Survivor Spouse's Benefit Option for employees age 45 to 55 who are 100% vested.

This option enables you to provide for a part of your Retirement Income to be paid to your spouse in the event of your death if you are willing to take a smaller Retirement Income when you retire. If you elect the 50% Survivor Spouse's Benefit Option, the reduction in your Retirement Income depends on the age and sex of your spouse. You may not elect this Option for a person other than your spouse.

You may specify the date on which this Option will be effective but this Option may not become effective until the later of (1) your 45th birthday, or (2) one year after the date of election. In addition, both you and your spouse must be living on the effective date for the Option to become effective. You must also be 100% vested for this Option to become effective.

You may elect to cancel your 50% Survivor Spouse's Benefit Option. The cancellation will be effective after a one-year waiting period if both you and your spouse are living on that date. If you elect to cancel this Option, there will be a permanent reduction in your Retirement Income for the Period this Option was in effect. The permanent reduction for each year or partial year this Option was in effect will be .50%.

EXAMPLE:

Assume an employee elects the 50% Survivor Spouse's Benefit Option at age 44. The Option becomes effective at age 45. The employee dies at age 50 and has a spouse who is two full years younger than the employee. The employee's pension accrual to date of death is $550.00.

The monthly Retirement Income calculations are as follows:

Retirement income accrued at death	$550.00
*Early Retirement reduction factor	x 70.0%
Reduced benefit for early retirement	$385.00
50% Survivor Benefit factor	x 85.4%
Reduced benefit for 50% Survivor Spouse's Option	$328.79
50% Survivor Option	x 50%
Benefit payable to spouse beginning the 1st of the month	

following employee's death payable for life $164.40

*Early retirement reduction factor for ages 45 to 55 = 70%.

If your spouse dies before you retire and after this Option becomes effective, this Option will be cancelled immediately and your monthly retirement income will be reduced for the period of time this Option was in effect.

(b) Survivor Benefit Option for employees age 55 to 65

This Survivor Benefit option enables you to provide 25%, 50%, 75% or 100% of your Retirement Income to be payable, after your death, to your spouse or any other person you name as your survivor beneficiary if you are willing to take a smaller Retirement Income when you retire. If you elect this Option, the reduction in your Retirement Income depends on (a) the age and sex of you survivor beneficiary, and (b) the percentage of your Retirement Income that you want to be payable to your survivor beneficiary. You may not elect this option for a person other

than your spouse if by such election your Retirement Income would be reduced to less than 51% of normal value at age 65.

This option may be elected at any time before your Normal or Early Retirement Date. You may also specify the date on which this option will be effective, but this option can not become effective until the later or (1) your 55th birthday, or (2) one year after the date of election. In addition, both you and your survivor beneficiary must be living on the effective date for the option to become effective. However, in the event of your accidental death within the one-year waiting period, the election will be effective on the date of your death if such accidental death occurs on or after your 55th birthday.

EXAMPLE:

Assume the employee in the example shown in the section titled "Retirement Income" is a male, is 65 years of age at January 1, 1983 and retires on that date. He previously elected the 50% Survivor Spouse's Benefit Option which

became effective at his age 45 and elected the 100% Survivor Benefit Option for his spouse which became effective at his age 55 and his spouse is 2 full years younger than he is.

The monthly Retirement Income calculations are as follows:

His Retirement Income accrued at January 1, 1983	$719.11
100% Survivor Benefit factor for male employee with female survivor beneficiary 2 full years younger	x74.5%
His reduced Retirement Income for his life	$535.74
100% Survivor Benefit Option	x 100%
Retirement Income payable to spouse for her life after his death	$535.74

If his spouse does not survive him, he will continue to be paid his reduced Retirement Income in the amount of $535.74.

You may elect to cancel or change the percent of you[r] Survivor Benefit Option. The cancellation or modification will be effective after a one-year waiting period if both you and your survivor beneficiary are living on that date. If you elect to have a higher percent that you previously elected there will be no penalty. If you elect a lower percent or elect to cancel, there will be a permanent reduction in your Retirement Income for the period the Option was in effect.

The amount of the permanent reduction in your normal Retirement Income will be as follows:

If you elect or cancel your Option, the permanent reduction for each year or partial year the Option was in effect will be:

if 100% Option	1.00%	if 50% Option	.50%
if 75% Option	.75%	if 25% Option	.25%

If you elect to modify your Option to a lower percent, the permanent reduction for each year or partial year the Option was in effect will be:

if reducing from	100%	to 75%	.25%
	100%	to 50%	.50%
	100%	to 25%	.75%
if reducing from	75%	to 50%	.25%
	75%	to 25%	.50%
	50%	to 25%	.25%

If your Survivor Beneficiary dies before you retire and after the Option becomes effective, the Option will be cancelled immediately and your monthly income will be reduced for the cancellation when you retire.

SOCIAL SECURITY OPTION

If you decide to retire early and before Social Security benefits are payable to you (presently age 62 or the

effective date of a disability award from Social Security) you may elect to be paid your Retirement Income under the Social Security Option. Under this Option you will be paid an increased amount of Retirement Income for the Period before you are eligible to receive income under the Federal Social Security Act in effect at the time of your retirement and a reduced amount thereafter, so that your total Retirement Income paid each month from the Plan and Social Security will be level, as far as practicable, throughout your lifetime, as computed at the time of your retirement.

2. Excerpt from 1977 Summary Plan Description

NORMAL METHOD OF PAYMENT IF YOU ARE NOT MARRIED

If you are not legally married at the time of your retirement, your normal method of payment of Retirement Income will be in the form of a life annuity payable for the remainder of your life unless you have elected one of the optional forms of payment.

OPTIONAL FORMS OF RETIREMENT INCOME

The Plan provides two optional forms of Retirement Income. Either or both of these options may be elected by you, subject to the provisions of these options.

CONTINGENT ANNUITY OPTION

The Contingent Annuity Option enables you to provide 25%, 50%, 75% or 100% of your Retirement Income to be payable, after your death, to the person you name as your contingent annuitant if you are willing to take a smaller Retirement Income when you retire. If you elect the Option, the reduction in your Retirement Income depends on (a) the age and sex of your contingent annuitant, and (b) the percentage of your Retirement Income that you want to be payable to your contingent annuitant. You may not elect this option for a person other than your spouse if by such election your Retirement Income would be reduced to less than 51% of normal value at age 65.

This option may be elected at any time before your Normal or Early

Retirement Date. You may also specify the date on which the option will be effective, but it may not become effective until the later of (1) your 55th birthday, or (2) two years after the date of election. In addition, both you and your contingent annuitant must be living on the effective date for the option to become effective. However, in the event of your accidental death within the two-year waiting period, the election will be effective on the date of your death if such accidental death occurs on or after your 55th birthday.

You may elect to cancel or change the percent of your Contingent Annuity Option. The cancellation or modification will be effective after a two-year waiting period if both you and your contingent annuitant are living on

that date. If you elect to have a higher percent than you previously elected there will be no penalty. If you elect a lower percent or elect to cancel, there will be a permanent reduction in your Retirement Income for the period the Option was in effect.

The amount of the permanent reduction in your normal Retirement Income will be as follows:

If you elect to cancel your Option, the permanent reduction for each year or partial year the Option was in effect will be:

if 100% Option 1.00%	if 50% Option .50%
if 75% Option .75%	if 25% Option .25%

If you elect to modify your Option to a lower percent, the permanent reduction for each year or partial year the Optionwas in effect will be:

if reducing from	100%	to 75%	.25%
	100%	to 50%	.50%
	100%	to 25%	.75%
if reducing from	75%	to 50%	.25%
	75%	to 25%	.50%
	50%	to 25%	.25%

If your Contingent Annuitant dies before you retire and after the Option becomes effective, the Option will be cancelled immediately and your monthly income will be reduced for the cancellation when you retire.

EXAMPLE

Assume the employee in the example shown in the section titled "RETIREMENT INCOME" is a male, is 65 years of age at January 1, 1978 and retires on that date. He previously elected the 25% Contingent Annuity Option which is in effect and his sister, who is 7 full years younger than he, is his named Contingent Annuitant.

The monthly Retirement Income calculations are as follows:

His Retirement Income accrued at January 1, 1978	$498.10
25% Contingent Annuity factor for male employee with female contingent annuitant 7 years younger	x90.5%
His reduced Retirement Income payable for life	$450.78
25% Contingent Annuity Option	x .25%
Retirement Income payable to sister for her life after his death	$112.70

If his sister does not survive him, he will continue to be paid his reduced Retirement Income in the amount of $450.78.

SOCIAL SECURITY OPTION

If you decide to retire early and before Social Security benefits are payable to you (presently age 62 or the effective date of a disability award

from Social Security) you may elect to be paid your Retirement Income under the Social Security Option. Under this option you will be paid an increased amount of Retirement Income for the period before you are eligible to receive income under the Federal Social Security Act and a reduced amount thereafter, so that your total Retirement Income paid each month from the Plan and Social Security will be level throughout your lifetime, as computed at the time of your retirement.

EXAMPLE

Assume an employee elects to retire at age 58. At that date he has a monthly benefit accrual of $500 payable at age 65. Also assume his monthly

Social Security benefit is $335 payable at age 65.

Calculation of his early Retirement Income is:

Factor for 7 years (84 months) early retirement is 84 x .3333 (1/3 of 1%)=28%. Early retirement factor is 72%. (100% - 28%)

	Monthly Retirement Income	
	Prior to Age 62	At and After Age 62
From Retirement Plan		
($500 x 72%)	$360.00	
Social Sec. Option		$333.20
($335 x 72%)	241.20	
From Social Sec. Administration		
($335 x 80%)*	-	268.00
Total Retirement Income	$601.20	$601.20

*Social Security Act provides for payment at age 62 or later reduced by

6-2/3% per year for period prior to age 65.

Supreme Court, U.S.
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No. 86-535

In The
Supreme Court of the United States
October Term, 1986

BESSIELOVE LEE,

Petitioner,

v.

UNION ELECTRIC COMPANY, a corporation, and UNION ELECTRIC RETIREMENT PLAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Employee Retirement Income Security Act, 29 U.S.C. § 1055 (1985) 5, 8

STATEMENT OF THE CASE

Petitioner Bessielove Lee brought this action against Union Electric Company[1] (the Company) and the Union Electric Retirement Plan (the Plan) seeking damages equal to a 50% survivor annuity. Mrs. Lee's husband died at age 61 while employed by the Company. He had not elected survivor benefits which would have provided annuity payments to his wife in the event of his death before retirement. Mrs. Lee claimed that Respondents failed to adequately inform her husband of the need for such an election. The District Court held that the information supplied to Mr. Lee adequately explained the need for an election. The Eighth Circuit affirmed the District Court's judgment.

The Petition omits some facts on which the District Court and the Eighth Circuit relied and which are relevant to this Petition. A summary of those facts follows.

The 1974 Union Electric Retirement Plan provided that the regular method of payment of retirement benefits was a life annuity with monthly payments until the death of the employee. In the alternative, an employee could elect the Contingent Annuity Option, under which the employee agreed to receive a reduced retirement income during his or her life and designated an annuitant to receive, upon the employee's death, a life annuity amounting to 100%, 75%, 50% or 25% of the employee's pension benefits. A Contingent Annuity Option could not become effective until the latter of (1) the employee's fifty-fifth birthday, or (2) two years after the date of the election.

---

[1]Union Electric Company has no parent company and no subsidiaries other than a wholly-owned subsidiary. Rules of the Supreme Court of the United States, Rule 28.1.

On June 28, 1974, a few months before his fifty-third birthday, Mr. Lee received a packet of information from the Company notifying him of his eligibility to elect the Contingent Annuity Option. In addition to the letter explaining the option, the information packet contained a statement of Mr. Lee's plan benefits; an explanatory booklet on the Contingent Annuity Option, with examples of how the option operated; a Notice of Election form and a sample completed Notice of Election form; and a form on which the employee could request further information.

The letter accompanying the information packet explained that the Contingent Annuity Option allowed an employee to provide for a portion of his retirement income to be paid after his death to his chosen annuitant. If this option were elected, the employee would receive a smaller pension when he retired. The letter stated:

> (b) *You may elect the Option to be in effect as early as your 55th birthday and before you retire.* If the Option is in effect and you die before you retire, and if your Contingent Annuitant survives you, she (he) would be paid a monthly pension for the remainder of her (his) life. Such monthly pension would be a percentage as specified in your elected Option of the pension that would have been paid to you if you had lived and retired on the first of the month folowing your death; . . .

The letter also stated:

> The decision to elect the Option or not is a matter of personal judgment to be based on your particular circumstances and objectives. The election and operation of the Option is a complex matter and you may want more information before you decide to elect it or not. If so, we will be glad to review it with you at your convenience. (See Opinion, Appendix, A9-A10)

The explanatory booklet included in the packet explained the Option in a question and answer format and provided specific examples of its operation and effect. (Opinion, A10-A11) Under the heading "*What if I die before I retire?*" the booklet stated:

> *If the Option is in effect,* and you die before you retire, a monthly payment, starting as of the first of the month after your death, would be made to your "Contingent Annuitant" if she (he) is still living. The monthly payment would continue for the life of your "Contingent Annuitant" and would amount to the percentage, as elected by you, of the pension that would have been paid to you if you had lived and retired on the first of the month following your death. (See example III attached.) (Emphasis in original.)

Mr. Lee did not respond to this mailing, and the Company sent him a follow-up letter dated August 15, 1974, reminding him of the Option and requesting that he inform the Company whether he wished to elect the Option or had any further interest in it. A self-addressed envelope was enclosed with the letter which again stressed the importance of the election and advised Mr. Lee of the Company's willingness to provide further information. (Opinion, A11-A12)

The Company never received a Notice of Election or any other response from Mr. Lee, nor did the Company ever receive any proof of age for a Contingent Annuitant from Mr. Lee, as required by the Notice of Election.

In October 1975, the Company mailed a memorandum to its employees summarizing changes to be made in the Retirement Plan to comply with ERISA. The memorandum stated:

> The payment of retirement income provisions will be amended to provide that the *normal* form of annuity payment will be a qualified spouse benefit with the 50% Contingent Annuity Option in effect at retirement, provided the employee is married prior to the initial date of commencement of benefit payments. All other provisions now contained in the Plan which define the terms and conditions of the Contingent Annuity Option will be continued. It will be amended, however, to provide that a participant may elect, upon proper notice to the Company, to receive his benefits under the life annuity option of the Plan without a spouse benefit. (Opinion, A12-A13).

The changes became effective January 1, 1976, and a summary plan description was issued by the Company in November of 1977. The summary identified the normal method of payment of retirement income for married employees as the "50% Contingent Annuity Option." The summary identified as an optional form of payment, which could be elected, the "Contingent Annuity Option", which "enables you to provide 25%, 50%, 75% or 100% of your Retirement Income to be payable after your death, to the person you name as your Contingent Annuitant . . ." (A78-A83) The summary stated that this option could be elected to become effective as early as the employee's fifty-fifth birthday. (A79-A80)

In 1981, the names of the retirement payment methods were changed. The 50% Contingent Annuity Option was renamed the "50% Survivor Benefit Option" and the Contingent Annuity Option was renamed the "Survivor Benefit Option." The September 1982 summary plan description, excerpts from which are quoted in the Petition and Appendix (A69-A76), used the new names for these forms of payment but otherwise employed essentially the same lan-

guage used in the 1977 summary to explain the options. The 1982 Summary Plan Description again described the survivor benefit option for employees aged 55 to 65 as an option which "may be elected by you."

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REASONS FOR DENYING THE WRIT

The issue presented to the District Court and the Eighth Circuit in this case was whether Mr. Lee, who had not made the election and who died while employed by the Company, had been adequately advised of the need to make an election if he wished to provide an annuity for a beneficiary in the event of his death prior to retirement. The District Court held that the summary plan description satisfied the requirements of ERISA, 29 U.S.C. § 1022(a) and that Mr. Lee was adequately advised concerning the need for an election. (District Court Memorandum, A45-A48) The decision of the Eighth Circuit affirming the judgment on the merits was correct and should not be disturbed.

The decision of the Eighth Circuit is not in conflict with that of any other circuit, nor does this case raise any important question of federal law which requires consideration by this Court.

This case is not significant and can have no precedential value because of the 1984 Amendments to ERISA. As amended, 29 U.S.C. § 1055, applicable to plan years beginning after December 31, 1984, provides that every payment of pension plan benefits must be in the form of an annuity which will benefit the participant's surviving

spouse, unless the participant elects otherwise, with the spouse's written and witnessed consent.

Contrary to Petitoner's suggestion, the Eighth Circuit did not set any standard for proof of reliance in ERISA cases. The court squarely stated that its decision rested on its determination that the summary plan description adequately explained the need for an election. (Opinion, A26-A27) It simply noted in addition that had the summary plan description been found to be inadequate, plaintiff would still have faced a significant barrier to recovery, because of the difficulty in showing prejudice flowing from the summary when plaintiff's husband, having received two letters and many other materials concerning the option, had expressed no interest in it at all. (Opinion, A27) Petitioner's suggestion that this Court adopt a presumption of reliance similar to that applied in some federal securities law cases is not only inapposite but addresses a matter neither decided by the Eighth Circuit nor essential to its decision.

I

THE EIGHTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S HOLDING THAT THE SUMMARY PLAN DESCRIPTION WAS ADEQUATE AND THE EMPLOYEE WAS ADEQUATELY ADVISED OF THE PLAN PROVISIONS, AND THIS CASE DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW REQUIRING THE CONSIDERATION OF THIS COURT

The question of whether any summary plan description is adequate necessarily depends upon the particular wording of the summary description at issue, so that each

such determination is necessarily fact-specific and can provide very little precedential value or guidance for determining the adequacy of any other summary plan description.

The Eighth Circuit, having considered the language of this particular summary plan description and having reviewed the findings of fact and conclusions of law made by the District Court, determined that the summary plan description adequately explained the need for an election. The summary repeatedly referred to the need to elect the option and used such terms as:

> If you *elect* the option .... (A72)
> You may not *elect* this option for a person other than your spouse if by such election your retirement income would be reduced to less than 51% of normal value at age 65. (A72-A73)
>
> This option *may be elected* at any time before your Normal or Early Retirement Date. (A73)
>
> . . . it may not become effective until the later of (1) your 55th birthday, or (2) two years after the *date of election.* (A73)
>
> (Emphasis supplied)

Since the summary plan description repeatedly referred to the need to make an election, it was not necessary that the summary also state that if no election were made, the benefits of the option would not be available. The Eighth Circuit properly held that the summary plan description satis-

fied 29 U.S.C. § 1022 (a) and adequately explained the need for an election.[2]

The decision in this case can be expected to be of no significance in future determinations of the adequacy of summary plan descriptions, not only because the decision turned on the particular wording of this summary plan description, but because the election involved in this case has been abolished by the amendment to 29 U.S.C. § 1055. The amendment makes a survivor annuity automatic, even in the case of an employee's death prior to retirement, unless the employee has elected to waive the survivor annuity form of benefit, and his spouse has consented in writing to such waiver, and her consent has been witnessed by a plan representative or notary public.

Petitioner suggests that notwithstanding this amendment, the importance of assuring complete information requires this Court's consideration of this case. (Petition, p. 27) However, because the decision in this case necessarily depended upon the facts of this case and the language of the particular summary plan description at issue, this decision cannot be expected to affect the outcome of any other case or to affect the participants and beneficiaries of any other retirement plan. The Eighth Circuit properly de-

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[2]Petitioner attempts to make much of the fact that the Eighth Circuit's opinion as initially issued referred in one paragraph to the "plan" rather than to the "summary". (Petition p. 17). This is obviously an oversight of no significance. As noted above, the summary plan description did repeatedly refer to the need for an election, and the Court referred in the same paragraph and elsewhere in its opinion to the adequacy of the summary plan description. The oversight was corrected by the Court on its own motion.

cided this case under the law on the record before it, and its judgment should not be disturbed.

II

THE EIGHTH CIRCUIT DID NOT PURPORT TO SET A STANDARD FOR PROOF OF RELIANCE IN ERISA CASES, AND THE SECURITIES LAW CASES RELIED ON BY PETITIONER ARE INAPPOSITE

Petitioner suggests that this Court should adopt a standard of proof on the issue of reliance similar to that adopted in certain federal securities law cases, in particular *Mills v. Electric Auto-Lite Company,* 396 U.S. 375 (1970), and *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972). That argument must be rejected for two reasons.

First, the Eighth Circuit's decision does not depend upon any consideration of reliance or lack of reliance. The opinion states:

> Our decision rests on our determination that the summary plan description adequately explains the need for an election. (A26-A27)

The court then added:

> We think it is appropriate to note, however, that even had we found that the summary plan description was inadequate, the absence of any indication that Mr. Lee expressed any interest in the Survivor Benefit Option, despite the repeated opportunities to do so, would pose a significant barrier to recovery. To secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary. See *Govoni v. Bricklayers,* 732 F.2d 250, 252 (1st. Cir.

1984); *Hillis v. Waukesha Title Co., Inc.*, 576 F.Supp. 1103, 1109-10 (E.D. Wis. 1983).

The court's comment and its reference to the *Govoni* and *Hillis* cases do not, as Petitioner suggests, amount to a holding that plaintiff must prove directly that the deceased employee was misled. (Petition p. 25) Nor did the Eighth Circuit, as Petitioner suggests, impose a standard that "hardly anyone could meet." (Petition p. 25) The principle that there must be some showing of causation between the plan description and the injury complained of has been recognized in many cases, including those cited in the opinion. However, the Eighth Circuit did not impose any standard for proof of reliance, because as it clearly stated, its decision affirming judgment in favor of Respondents and against Petitioner was based on its determination of the adequacy of the summary plan description. The court's comment on the particular fact circumstances here, in which the plan participant expressed absolutely no interest in this option, did not determine the outcome of this case and cannot be expected to affect any other case.

In addition, neither of the federal securities law cases on which petitioner relies is or should be applicable to the present case or to ERISA cases in general. In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the court held that if a proxy solicitation is found to be defective in that it is materially misleading, and if the plaintiff proves that the proxy solicitation itself was an essential link in the accomplishment of the transaction for which the proxy was delivered, such proof satisfies the requirement of causation between the defect and the transaction, and he need not prove in addition that the particular defect in the solicitation material caused the transaction.

In the present case, neither the summary plan description nor the materials furnished to Mr. Lee in 1974 and thereafter were materially misleading. Either individually or in combination, the summary plan description and other materials adequately advised Mr. Lee concerning the opportunity to elect an annuity to be paid to his spouse in the event of his death prior to retirement and of the need to make such an election and have it become effective. There is no evidence to support Petitioner's suggestion that her husband was "positively misled." (Petition p. 20) As the Eighth Circuit observed, the District Court noted that although there was testimony that Mr. Lee had stated that Mrs. Lee would receive a percentage of his retirement benefits, the witness who so testified stated that Mr. Lee had said Mrs. Lee would receive the benefits *if and when he retired.* (Opinion, A26) That is exactly what would have happened, since no election of pre-retirement benefits had been made.

In *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), the court held that plaintiffs could make a submissible case of securities fraud without specifically proving reliance on defendant's fraudulent failure to disclose that they were in effect acting as market makers for themselves and others with respect to plaintiffs' interests in tribal property. That decision has no application here, where there was no omission and certainly no fraud.

These securities law decisions are simply inapposite to ERISA cases, and in any event, this case is not a suitable vehicle for presentation of the question whether some particular standard for proof of reliance should be adopted in

ERISA cases, because the decision in this case did not turn on a determination of reliance or lack thereof.

CONCLUSION

For the foregoing reasons, this case does not present any questions of general importance which should be considered by this Court, and the Petition for a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit should be denied.

Respectfully submitted,

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